

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 NINA FRENCH,

11 Plaintiff,

12 v.

13 WASHINGTON STATE
14 DEPARTMENT OF HEALTH, et
al.,

15 Defendants.

CASE NO. C15-0859JLR

ORDER GRANTING MOTION
FOR JUDGMENT ON THE
PLEADINGS AND GRANTING
LEAVE TO AMEND

16 **I. INTRODUCTION**

17 Before the court is Defendant Washington State Department of Health's ("the
18 DOH") motion for judgment on the pleadings. (Mot. (Dkt. # 23).) The court has
19 reviewed the motion, Plaintiff Nina French's letter in response to the motion, the DOH's
20 reply in support of the motion, the relevant portions of the record, and the applicable law.

21 //

22 //

1 Being fully advised,¹ the court GRANTS the DOH's motion and GRANTS Ms. French
 2 leave to amend her complaint for the reasons set forth below.

3 II. BACKGROUND

4 This case arises out of Ms. French's employment with divisions of the DOH at
 5 various periods between 2010 and 2014. (FAC (Dkt. # 18) Ex. 2 at 1.) On June 4, 2015,
 6 Ms. French, who is proceeding *pro se* and *in forma pauperis* ("IFP"), filed her first
 7 complaint against the DOH. (*See* Compl. (Dkt. # 3); IFP Mot. (Dkt. # 1); Order Granting
 8 IFP Status (Dkt. # 2).) Pursuant to Ms. French's request, the court ordered the United
 9 States marshal to serve the DOH within 30 days of July 8, 2016. (7/8/16 Order (Dkt.
 10 # 13) (citing 28 U.S.C. § 1915(d) (Upon an IFP plaintiff's request, "the officers of the
 11 court shall issue and serve all process."))).)

12 After the DOH was served, Ms. French filed another action, which the court
 13 consolidated with this matter. (10/4/16 Order (Dkt. # 17).) Because Ms. French intended
 14 to amend her complaint rather than file a new case, the court construed Ms. French's
 15 filing as her amended complaint when it consolidated the two cases. (*Id.*; FAC.) In her
 16 amended complaint, Ms. French alleges that the DOH engaged in "[w]histleblower
 17 retaliation, sexual harassment[,], and use of disability to do psychological damage."
 18 (FAC at 2.) Ms. French asserts a claim under Title VII of the Civil Rights Act of 1964
 19 and alleges that this discrimination occurred between about January 1, 2013, and the
 20

21 ¹ Neither party requested oral argument, and the court finds that oral argument would not
 22 be helpful to its consideration of the motion. *See* Local Rules W.D. Wash. LCR 7(b)(4) ("Unless
 otherwise ordered by the court, all motions will be decided by the court without oral argument.").

1 “present.” (*Id.*) Ms. French also contends that she filed an Equal Employment
 2 Opportunity Commission (“the EEOC”) charge against the DOH on May 29, 2014, and
 3 received a right to sue letter on March 18, 2014.² (*Id.*)

4 On October 31, 2016, the DOH filed the instant motion for judgment on the
 5 pleadings for lack of subject matter jurisdiction and failure to state a claim.³ (*See* Mot. at
 6 1.) On November 29, 2016, the DOH filed a reply brief in support of its motion and
 7 noted that Ms. French had not filed any opposition to the DOH’s motion. (Reply (Dkt.
 8 # 28) at 2 (“While plaintiff’s failure to respond to the motion is not dispositive, her
 9 failure to respond with facts or counter arguments leaves [the] DOH’s arguments to stand
 10 or fall on their own merits in the evaluation of the [c]ourt.”).) After the DOH filed its
 11 reply, Ms. French left a voicemail message in which she announced that she did not know
 12 she had to respond to the DOH’s motion (*see* 12/2/16 Order (Dkt. # 30) at 1) and filed a
 13 letter requesting “forgiveness for my lack of education regarding Civil Rights law . . . and
 14 how the legal system operates (12/5/16 Letter (Dkt. # 31) at 1 (ellipsis in original).) Ms.
 15 French’s December 5, 2016, letter also repeats some of the factual allegations included in

16
 17 ² The date on which Ms. French alleges that she received the right to sue letter appears to
 be a scrivener’s error.

18 ³ Ms. French’s amended complaint also names “WFSE/AFSCME” and “FDA Center for
 19 Veterinary Medicine” as defendants. (*See* FAC at 1.) Those two defendants have not answered
 20 Ms. French’s amended complaint or otherwise appeared in the case. (*See* Dkt.) Indeed, Ms.
 21 French has not asked the United States marshal to serve those defendants. (*See id.*; 6/3/16 Letter
 22 (Dkt. # 12) (asking the court to order service on the DOH).) However, the court concludes that
 this order applies with equal force to “WFSE/AFSCME” and “FDA Center for Veterinary
 Medicine” and dismisses Ms. French’s complaint against them for failure to state a claim. *See*
infra § III.B; 28 U.S.C. § 1915(e) (giving district courts authority to review IFP complaints and
 dismiss them if “at any time” the court determines that an IFP complaint is frivolous or fails to
 state a claim on which relief may be granted).

her amended complaint and makes new factual allegations. (*Compare* FAC, with 12/5/16 Letter.) Ms. French does not, however, respond to the DOH’s motion. (*See* 12/5/16 Letter.)

III. ANALYSIS

A. Legal Standard

Under Federal Rule of Civil Procedure 12(c), “[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c).

When a Rule 12(c) motion “raises an issue as to the court’s subject matter jurisdiction . . . , the district judge will treat the motion as if it had been brought under Rule 12(b)(1).” *Ass’n of Apartment Owners of Pomaikai v. McDonough*, No. 13-00254 DKW KSC, 2014 WL 692917, at *3 (D. Haw. Feb. 20, 2014) (quoting 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1367 (3d ed. 2004)); *see also Leigh v. Salazar*, No. 3:11-cv-00608-HDM-WGC, 2013 WL 1249824, at *1 (D. Nev. Mar. 26, 2013). “Under Rule 12(b)(1), the plaintiff bears the burden of establishing subject matter jurisdiction.” *See Leigh*, 2013 WL 1249824, at *1.

Where the moving party seeks dismissal for failure to state a claim, “[a] Rule 12(c) motion for judgment on the pleadings and a Rule 12(b)(6) motion to dismiss are virtually interchangeable.” *Manchester v. Ceko Concrete Constr., LLC*, No. C13-0832RAJ, 2014 WL 6684891, at *3 (W.D. Wash. Nov. 24, 2014). “In fact, the same standard applies to both.” *Id.* Accordingly, “[i]n considering a motion for judgment on the pleadings, a court must accept as true all material allegations in the complaint and

1 must construe those allegations in the light most favorable to the plaintiff.” *United States*
2 *v. In re Seizure of One Blue Nissan Skyline Auto. & One Red Nissan Skyline*, 683 F.
3 Supp. 2d 1087, 1088 (C.D. Cal. 2010) (citing *Pillsbury, Madison & Sutro v. Lerner*, 31
4 F.3d 924, 928 (9th Cir. 1994)). To survive a motion for judgment on the pleadings, “a
5 complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
6 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting
7 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Telesaurus VPC, LLC v.*
8 *Power*, 623 F.3d 998, 1003 (9th Cir. 2010). “A claim has facial plausibility when the
9 plaintiff pleads factual content that allows the court to draw the reasonable inference that
10 the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

11 The court, however, need not accept as true a legal conclusion presented as a
12 factual allegation. *Id.* Although Federal Rule of Civil Procedure 8 does not require
13 “detailed factual allegations,” it demands more than “an unadorned, the-defendant-
14 unlawfully-harmed-me accusation.” *Id.* (citing *Twombly*, 550 U.S. at 555). A pleading
15 that offers only “labels and conclusions or a formulaic recitation of the elements of a
16 cause of action” will not survive a motion to dismiss under Federal Rule of Civil
17 Procedure 12(b)(6). *Id.* A complaint does not survive dismissal where “it tenders ‘naked
18 assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at
19 557). In addition, “[a] plaintiff suing multiple defendants ‘must allege the basis of [her]
20 claim against each defendant to satisfy Federal Rule of Civil Procedure 8(a)(2), which
21 requires a short and plain statement of the claim to put defendants on sufficient notice of
22 the allegations against them.’” *Flores v. EMC Mortg. Co.*, 997 F. Supp. 2d 1088, 1103

1 (E.D. Cal. 2014) (quoting *Gauvin v. Trombatore*, 682 F. Supp. 1067, 1071 (N.D. Cal.
2 1988)).

3 “Because [a motion to dismiss and a motion for judgment on the pleadings] are
4 analyzed under the same standard, a court considering a motion for judgment on the
5 pleadings may give leave to amend and ‘may dismiss causes of action rather than grant
6 judgment.’” *Manchester*, 2014 WL 6684891, at *3 (quoting *Moran v. Peralta Cmty.*
7 *Coll. Dist.*, 825 F. Supp. 891, 893 (N.D. Cal. 1993)).

8 **B. The DOH’s Motion**

9 The DOH seeks judgment on the pleadings and dismissal of Ms. French’s
10 amended complaint for lack of subject matter jurisdiction and failure to state a claim
11 upon which relief may be granted. (Mot. at 1.) Specifically, the DOH argues that—to
12 the extent Ms. French alleges such claims—Ms. French’s federal whistleblower
13 retaliation claims, Americans with Disability Act (“ADA”) claim, Age Discrimination in
14 Employment Act (“ADEA”) claim, and “claim related to personal property” should be
15 dismissed for want of subject matter jurisdiction. (*See id.* at 6-9.) The DOH also
16 contends that Ms. French fails to state a claim under Title VII of the Civil Rights Act, the
17 ADA, the ADEA, Washington law, and the Collective Bargaining Agreement (“CBA”) to
18 which Ms. French was subject during her employment. (*Id.* at 9-20.)

19 Ms. French’s amended complaint contains few allegations related to her claims.
20 (*See* FAC; Exhibits (Dkt. ## 18-1, 18-2).) Instead, Ms. French relies on 160 pages of
21 attachments to supply the substance of her complaint. (*See* Exhibits.) For this reason,
22 Ms. French’s amended complaint is legally deficient and fails to allege facts sufficient to

1 support a plausible claim to relief. Ms. French “may not attach a large number of
2 exhibits to [her complaint] with the expectation that the [c]ourt will read the exhibits and
3 extract the necessary factual pieces to construct a cognizable claim on [Ms. French’s]
4 behalf.” *Holy Ghost Revival Ministries v. City of Marysville*, 98 F. Supp. 3d 1153,
5 1178-79 (W.D. Wash. 2015) (internal quotation marks omitted).

6 Further, the court concludes that the DOH’s arguments have merit, particularly in
7 light of Ms. French’s failure to respond substantively to the DOH’s motion. For
8 example, the DOH argues that the court does not have subject matter jurisdiction over
9 this action because to the extent Ms. French intends to bring a claim under the federal
10 Whistleblower Protection Act (“WPA”), the WPA applies only to certain federal
11 government employees and does not provide a private cause of action. (*See* Mot. at 6-7.)
12 In addition, Eleventh Amendment sovereign immunity appears to bar Ms. French’s
13 federal discrimination claims and any claim she intends to bring under 42 U.S.C. § 1983.
14 (*See id.* at 7-9.) Ms. French has not met her burden of establishing that the court has
15 subject matter jurisdiction over these claims. *See Leigh*, 2013 WL 1249824, at *1.

16 The DOH also makes the following arguments: (1) Ms. French fails to state a
17 claim under Title VII of the Civil Rights Act because she failed to timely file a charge
18 with the EEOC and does not plausibly allege facts to support a claim of gender
19 discrimination (*id.* at 11-12); (2) Ms. French fails to state a claim under the ADA because
20 she alleges no facts to support a plausible inference that she ever told the DOH she had a
21 disability, that her disability impacted her ability to perform the essential functions of her
22 employment, or that she required a reasonable accommodation to perform her job (*id.* at

13); (3) Ms. French fails to state a claim under the Washington Law Against Discrimination (“WLAD”) because Ms. French has not complied with the “necessary prerequisites to filing [such a] suit against the State” (*id.* at 16, 20); (4) Ms. French fails to state a claim under Washington’s Fourth Amendment because “courts in Washington have continuously refused to recognize a common law cause of action for enforcement of rights protected by the Washington Constitution” (*id.* at 17); and (5) Ms. French fails to state a claim under Washington unfair labor practices law because any such claim is barred by the applicable statute of limitations (*id.* at 19-20). The court agrees that Ms. French’s complaint does not contain sufficient factual allegations to state a claim under Title VII, the ADA, or Washington law. For these reasons, the court dismisses Ms. French’s complaint for lack of subject matter jurisdiction and failure to state a cognizable claim.

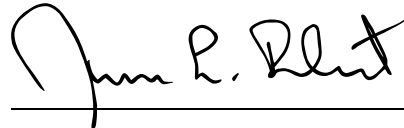
However, because Ms. French is proceeding *pro se*, the court declines to enter judgment as a matter of law and allows Ms. French one additional attempt to allege cognizable claims. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051-52 (9th Cir. 2003) (citing Fed. R. Civ. P. 15(a) and noting that the policy favoring amendment is to be applied with “extreme liberality”); *see also Manchester*, 2014 WL 6684891, at *3. The court directs Ms. French to pay close attention to the following principles. First, if Ms. French chooses to amend her complaint, the court instructs Ms. French to carefully consider the deficiencies discussed above. The court will interpret a failure to cure those deficiencies as an indication that further amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (noting that futility of amendment may preclude

1 additional amendment). Second, the court cautions Ms. French that any amended
2 complaint she files will supersede her previous complaints in this manner, *see Lacey v.*
3 *Maricopa Cty.*, 693 F.3d 896, 927-28 (9th Cir. 2012) (noting that “the general rule is that
4 an amended complaint super[s]edes the original complaint and renders it without legal
5 effect”), and that she may not rely on dozens of pages of exhibits from which she expects
6 the court to “construct a cognizable claim,” *Holy Ghost Revival Ministries*, 98 F. Supp.
7 3d at 1178-79 (internal quotation marks omitted). Instead, Ms. French must include in
8 her complaint “a short and plain statement of the grounds for the court’s jurisdiction” and
9 “a short and plain statement of the claim showing that [she] is entitled to relief.” Fed. R.
10 Civ. P. 8(a); *see also Harrell v. Hornbrook Cmty. Servs. Dist.*, No.
11 2:14-cv-01595-KJM-GGH, 2015 WL 5329779, at *4 (E.D. Cal. Sept. 10, 2015) (“While
12 documents definitional to a claim may be attached to the complaint, . . . it is not
13 appropriate to submit a myriad of evidentiary exhibits. The complaint becomes a large
14 evidentiary mess where the defendant is unsure of what to plead to, and unsure of what is
15 presumed true for the purposes of a motion to dismiss.”). Third, the court will not
16 entertain further requests for favorable treatment. Even though Ms. French is proceeding
17 *pro se*, she must comply with the Federal Rules of Civil Procedure and the Local Civil
18 Rules for the Western District of Washington. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th
19 Cir. 1987) (“Pro se litigants must follow the same rules of procedure that govern other
20 litigants.”), *overruled on other grounds by Lacey*, 693 F.3d at 925. Finally, Ms. French
21 must file her amended complaint, if any, within 14 days of the date of this order, and
22 failure to file an amended complaint will result in dismissal of this case with prejudice.

IV. CONCLUSION

For the reasons set forth above, the court GRANTS the DOH's motion for judgment on the pleadings (Dkt. # 23) and DISMISSES Ms. French's amended complaint WITHOUT PREJUDICE. The court DIRECTS Ms. French to carefully consider the deficiencies the court notes above in filing any amended complaint. Ms. French's second amended complaint, if any, is due within 14 days of the date of this order.

Dated this 25th day of January, 2017.

A handwritten signature in black ink, appearing to read "James L. Robart", written over a horizontal line.

JAMES L. ROBART
United States District Judge